(S F R V F D)
(SEPTEMBER 25, 1987)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-13

APPLICATION OF TARIFF FILING REQUIREMENTS TO THE CARRIAGE OF FOREST PRODUCTS UNDER THE SHIPPING ACT OF 1984

ORDER DENYING PETITION FOR DECLARATORY ORDER

This proceeding was initiated following the filing of a Petition for Declaratory Order ("Petition") by the U.S. Atlantic & Gulf/Australia-New Zealand Conference ("Petitioner") regarding the definition of "forest products" as used in section 8 of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. § 1707. That section exempts forest products from the general tariff-filing requirements of the 1984 Act. Petitioner seeks a ruling that this exemption "applies only to noncontainerized shipments of forest products." Replies to the Petition were filed by eight parties, two[1] generally

[1] In support of the Petition are a joint reply of four conferences--U.S. Atlantic-North Europe Conference, Gulf-European Freight Association, North Europe-U.S. Atlantic Conference, and North Europe-U.S. Gulf Freight Association (the "North Europe Conferences" or "NEC"); and another joint reply of four other conferences--Atlantic and Gulf/West Coast of South America Conference, U.S. Atlantic and Gulf/Ecuador Conference, U.S. Atlantic and Gulf/Southeastern Caribbean Conference, and U.S. Atlantic and Gulf/Hispaniola Steamship Freight Association, minus the participation of CTMT/Trailer Marine Transport, Corp. (the "Atlantic/Gulf Conferences").

supporting the Petition and six[2] opposing it.

POSITIONS OF THE PARTIES

A. The Petition and Replies in Support

Petitioner explains that it is uncertain as to the legal requirements of tariff-filing as applied to containerized forest products. It states that its former practice was to include rates for such products in its tariffs, but that it since abandoned this practice in response to requests from shippers for non-tariffed rates for containerized forest products, and in response to competition from other carriers in the trades which have adopted the shippers' broad view of the exemption.

The thrust of Petitioner's argument pertains to the definition of forest products contained in the 1984 Act. Section 3 of that Act states:

> (11) "forest products" means forest products in an unfinished or semifinished state that require special handling moving in lot sizes too large for a container, including, but not limited to lumber in bundles, rough timber, ties, poles, piling, laminated beams, bundled siding, bundled plywood, bundled core stock or veneers, bundled particle or fiber boards, bundled hardwood, wood pulp in rolls, wood pulp in unitized bales, paper board in rolls, and paper in rolls.

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[2] Replies opposing the Petition were filed by a group of eleven shippers of forest products in the states of Oregon and Washington ("Forest Products Shippers"), joined by the National Forest Products Association; American Paper Institute, Inc. ("API"), also joined by the National Forest Products Association; Australia-New Zealand Container Line ("ANZCL"); Star Shipping A/S ("Star Shipping"); Transpacific Westbound Rate Agreement, minus the participation of Sea-Land Corporation ("TWRA"); and (former) Senator Slade Gorton.

46 U.S.C. § 1702 (11) (emphasis added). Petitioner focuses on several phrases in the definition which allegedly support its view that only uncontainerized forest products are exempt from tariff-filing. It concedes that "moving in lot sizes too large for a container" is ambiguous. Petitioner notes that "lot sizes" may mean the dimensions of the forest products, or it may mean the volume of all the cargo in the shipment; "a container" can mean one, single container, or any container, i.e., containers in general.

Petitioner espouses the interpretation that the language refers to the dimensions of the cargo and to containers in general. Thus, it argues that the exemption applies only to cargo which, because of its odd dimensions, will not fit into any container. Only uncontainerized forest products allegedly are exempt from tariff-filing.

Support for this interpretation is found in other statutory language and in the legislative history, Petitioner claims. It emphasizes the "special handling" language in particular: for "special handling" to have any meaning at all, it must refer to cargo which is not containerized. Petitioner also argues that in the Conference Report on the 1984 Act, the Conference Committee indicated that it was adopting "essentially the same" forest products definition as that included in the Senate version, S.47. H.R. Rep. No. 600, 98th Cong., 2d Sess. 27 (1984). The Senate version had defined forest products as ranging "from being too large for containers up to and including

shipload lot sizes." S.47, 98th Cong., 1st. Sess. § 2(11), 129 Cong. Rec. S. 1828 (daily ed. Mar. 1, 1983). This, Petitioner asserts, indicates the phrase is intended to refer to cargo that is not containerized.

Both replies supporting the Petition take a narrower view of the forest products exemption than does Petitioner. While Petitioner argues that uncontainerized forest products are exempt, the Atlantic/Gulf Conferences' position is that only uncontainerizable forest products are exempt. The Atlantic/Gulf Conferences maintain that the "single container" interpretation of the definition would render the "special handling" language of the statute meaningless. The 1984 Act allegedly intended to exempt only cargo requiring special loading procedures--e.g., special lashing, stowage, or even vessel modification. Only if the cargo could not be containerized, the Atlantic/Gulf Conferences argue, does the exemption apply: "[i]f the forest products are or could be placed in a container or containers then a tariff must be filed." Thus, the Atlantic/Gulf Conferences submit that uncontainerized forest products which nevertheless could be containerized are not exempt, thereby adopting a narrower view of the exemption than does the Petitioner.

The North Europe Conferences agree that containerized cargo is not exempt, because no "special handling" is required. As for uncontainerized cargo, they contend the scope of the exemption still depends on whether special handling is required. NEC assert that even most

uncontainerized cargo does not need special handling. Thus, NEC too believe that the forest products exemption is narrower than just uncontainerized cargo, and suggest that only uncontainerizable cargo is exempt.[3]

B. Replies in Opposition

API argues that "lot sizes too large for a container" refers to the aggregate amount of cargo, and whether it will fit into one container or more than one container. If the forest products tendered for shipment are, as a grouping, greater than a containerload, then they are exempt from tariff-filing, according to API. This interpretation, API submits, is consistent with Congress' intent to allow forest products exported from the United States to compete more effectively with foreign-supplied forest products in the overseas trade. API cites the Notice of Inquiry in Docket No. 85-6, Inquiry Concerning Interpretation of Sections 8(a) and 8(c), Shipping Act of 1984: Excepted Commodities, where the Commission noted:

> The legislative history suggests that the purpose of the lumber exception was to remove this commodity from the price stabilizing influence of tariff filing and to make U.S. lumber more competitive with Canadian lumber which was not subject to any comparable tariff filing requirement.

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[3] While NEC argue that "special handling" is the essential criterion to determine exemption eligibility, they do not define the term other than to suggest it may be coextensive with "noncontainerizable." Thus, NEC's interpretation is probably identical in scope to that of the Atlantic/Gulf Conferences.

Notice of Inquiry, 50 Fed. Reg. 10808 (1985). United States forest products exporters are seriously handicapped, API states, if their applicable freight rates, being filed in tariffs, cannot be promptly and flexibly adjusted (i.e., lowered) to match those of their foreign competitors.

The Forest Products Shippers also take the position that the exemption applies if the commodities are in volumes in excess of one containerload, regardless of whether the cargo will be transported in containers or in breakbulk. They emphasize that the Act's definition of forest products includes a list of 17 commodities which typically move in large volumes and in containers. Interpreting the exemption to apply only to uncontainerized commodities, they argue, ignores the fact that it would have been very easy for Congress to specify "uncontainerized" if that is what was intended, and would effectively disqualify the 17 enumerated commodities as well.

The Forest Products Shippers state that "virtually all the specific products named in the definition are shipped in units which are universally adapted to containers," and are easily accommodated in standard containers. Why then, they ask, would Congress draft an exemption only for over-sized, uncontainerizable commodities while listing as examples of those commodities, easily containerizable products? Congress is therefore said to have intended to exempt all such commodities, containerized or not, depending on their aggregate volume.

Much reliance is placed by the Forest Products Shippers on the legislative history of the definition. They explain that the genesis of the forest products exemption was a "neo-bulk" exemption, written into unenacted predecessor bills aimed at large-volume shipments. In a subsequent bill, S.1583, the neo-bulk exemption was rewritten as a forest products exemption, as softwood lumber and other forest products had been the intended subjects of the neo-bulk provision. S.47 was modeled on S.1583, and contained the identical forest products definition. The House version of the 1984 Act, on the other hand, would have limited the forest products exemption to cargo "offered by the shipper as non-containerized cargo." The Forest Products Shippers emphasize that the Conference Committee expressly chose the Senate version over the House's, thereby expressing its preference for a broader exemption. The final product is allegedly an exemption based on commodity and volume criteria, not on container versus breakbulk transportation.

ANZCL repeats the shippers' general arguments with respect to the legislative history and to "lot sizes" as referring to aggregate volumes. ANZCL states that Petitioner places undue emphasis on the words "special handling." That phrase, ANZCL asserts, is not a further limitation, but rather a description of a general characteristic common to all unfinished and semi-finished forest products, such as the 17 enumerated examples in the definition. These commodities allegedly <u>usually</u> require

special handling--such as with special equipment in placing the cargo in containers either at the docks or when loaded from trucks hundreds of miles away. ANZCL argues that Congress was concerned only with exempting particular commodities in large volumes, and the "special handling" phrase merely helps to describe those types of commodities.

ANZCL also warns that if the Commission adopts Petitioner's interpretation, it would be requiring filing not only of tariffed rates but also of service contracts for containerized forest products. ANZCL points out that most such forest products currently move under service contracts rather than on the basis of a tariff rate. Therefore, it is argued that granting the Petition would substantially affect a previously unregulated and very significant portion of forest products.

Star Shipping states that "in general, neither tariffs nor service contracts on these commodities are filed," and it would like to maintain the status quo, noting that U.S. shippers need to compete with Canadian forest products suppliers and that this was the purpose of creating the exemption. It characterizes the "special handling moving in lot sizes too large for a container" language of the definition as "multiple criteria for determining whether particular commodities are exempt forest products." It contends that products other than those enumerated in the definition:

> must be evaluated as exempt or non-exempt on the basis of whether they are unfinished or semi-

> finished, whether they normally require special handling, whether they normally move in large lot sizes and how they usually are packaged.

These multiple criteria, Star Shipping asserts, were intended "to be applied to commodities generally and not on a shipment-by-shipment basis." Thus, Star Shipping sees the exemption as entirely commodity-based -- a broader view than that of the preceding opponents of the Petition.

Star Shipping identifies several practical difficulties which would arise should the Petition be granted. For example, it notes that it uses a fleet of open hatch vessels which carry both bulk and containerized cargo, sometimes on the same voyage. Star Shipping notes that under Petitioner's interpretation, some would be exempt and some would not. This would be an especially anomalous result, Star Shipping argues, inasmuch as it is often the carrier rather than the shipper which chooses whether and how much of the vessel's cargo to containerize above deck or to stow below deck in bulk parcels. Star Shipping submits that it would be inappropriate for the applicable rate to depend on the carrier's ultimate choice of transportation method; with containerization as the key to qualification for the forest products exemption, both shippers and carriers would be in a position to make those choices for the purpose of price manipulation, perhaps at the cost of efficient vessel utilization. Another effect of Petitioner's interpretation, Star Shipping argues, would be service contracts which are partially subject to filing and partially exempt.

TWRA, in opposing the Petition, argues that the exemption at issue is commodity-based, not packaging-based. Because the intention allegedly was to exempt certain commodities, notably softwood lumber, TWRA believes it would be nonsensical for Congress to enact a law which does not exempt containerized softwood lumber, as Petitioner claims. In identifying which other commodities are included in the exemption, TWRA argues that the containerization, shipment size and special handling references are merely characteristics which, if typical of a given commodity, indicate that the commodity is exempt.

TWRA asserts:

> Because the statutory criteria listed in section 2(11) [sic, 3(11)] are not internally consistent the obvious way to give weight to all of them is by treating them the way Congress surely intended: as a mix of factors for the Commission to apply in articulating whether any particular forest product commodity, not exempted by name, qualifies for the exemption on the basis of predominant characteristics of the commodity and how it is handled.*

> *The only other way to give effect to all the factors listed in the statute seems so unworkable, impossible to enforce and difficult to square with other statutory objectives that Congress could not have intended such a result. That approach would be to determine for each shipment whether it required special handling equipment, whether that shipment was too big for a single container, whether the commodity was on the list in the definition etc. Clearly this is unworkable.

TWRA suggests that the Commission should undertake to list all exempt commodities.

Finally, Senator Gorton states that the intention of the Senate was "to exempt particular types of unfinished and semi-finished forest products, including those enumerated in the bill." He explains that shippers of forest products wanted maximum flexibility in rates, and to meet those concerns, "the Senate included an exemption for all forest product shipments moving in lots larger than one container," not just for breakbulk cargo. Senator Gorton notes that the Conference Committee adopted the Senate approach and rejected the House version, which would have exempted only cargo offered by the shipper for uncontainerized transportation.

DISCUSSION

As reflected above, the forest products definition is capable of being variously interpreted. In fact, the definition has generated at least five different interpretations from the nine participants in this matter:

1. Only noncontainer<u>izable</u> forest products are exempt--the narrowest view (NEC and the Atlantic/Gulf Conferences).

2. Noncontainer<u>ized</u> forest products are exempt (Petitioner).

3. <u>All</u> forest products moving in lots larger than one

container are exempt (Sen. Gorton).[4]

4. Certain forest products are exempt, if they take up (or would take up) more than one container (ANZCL, API, and the Forest Product Shippers).

5. Certain forest products are unconditionally exempt, regardless of size or quantity--probably the broadest view (TWRA and Star Shipping).

Read in isolation, the phrase "lot sizes too large for a container" can reasonably be interpreted to refer to oversized cargo that cannot be containerized, or to a volume of cargo that would fill more than one container. The phrase standing alone is ambiguous; one must look to its context to construe its particular meaning.

Here, in the context of the full definition, inclusion of the term "that require special handling" tends to suggest that uncontainerized forest products are the intended commodity. However, the subsequent listing of forest products commodities which frequently or even typically are containerized suggests that containerization is not intended to be a criterion. Moreover, "special handling" is not defined in any way and may not mean "uncontainerized" at all. (It could refer to the special equipment normally used to load the cargoes into containers.) The apparent internal inconsistencies in the definition render it particularly

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[4] Senator Gorton's brief comment refers to Congress' intention to exempt "particular types" of forest products. Later, however, Senator Gorton refers to the Senate's inclusion of an exemption for "all" forest products.

important to consider the legislative history of the forest products exemption. See Lawson v. Suwannee Fruit & Steamship Co., 336 U.S. 198, 200-1 (1949); Green v. Commissioner of Internal Revenue, 707 F.2d 404, 405 (9th Cir. 1983); Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 408-9 (D.C. Cir. 1976).

As noted above, the history of the provision starts with predecessor legislation from the early 1980's. The Omnibus Maritime Regulatory Reform, Revitalization and Reorganization Act of 1980 (H.R. 6899) proposed to expand existing bulk cargo and softwood lumber exemptions to include "neo-bulk" cargo. "Neo-bulk" was defined in the House Report as cargo "which requires specialized handling and is moved in lot sizes which range from being too large for containers up to, and including, shipload lot sizes" (emphasis added).

The House Report referred to "the concerns of forest products manufacturers whose products generally move on specially designed ships . . . ." It continued: "In order to be "neo-bulk," the cargo must move in large lot sizes--larger than container loads and up to full ship loads. It also must be loaded and discharged using specialized equipment not generally used on standard liner vessels. Neo-bulk cargoes include such products as iron and steel . . . as well as forest products" (emphasis added). H.R. Rep. 96-935 Part 1, 96th Cong., 2d Sess. 35 (1980). Thus, it appears that even the predecessor bill created an

exemption which on the one hand seemed to cover forest products as a broad, general class, and on the other hand referred to special handling requirements. Meanwhile, the "too large for containers" and "larger than container loads" references in the predecessor bill seem to support Petitioner's view on noncontainerization as a criterion, rather than the view that two or more containers are exempt.

The "too large for containers" language was included in the Senate bills--S.1583 in the 97th Congress and S.47 in the 98th Congress. The House version in the 98th Congress was more clearly a narrow one, limiting the forest products exemption to "non-containerized cargo." H.R.1878, October 6, 1983. The Conference Committee essentially chose the Senate language over the House language. Although "containers" became "a container," it does not appear that this change was meant to clarify anything. The Conference Report suggests otherwise: "The forest products definition is essentially the same as that which was included in S.47 as passed by the Senate." However, the forest products definition was the <u>only</u> definition which was <u>not</u> adopted from the House bill. The Conference appears to have quite deliberately rejected the House's "non-containerized" restriction in preference for the Senate's more amorphous version, as amended to read "too large for a container." Thus, it seems that the bill evolved deliberately if not dramatically away from a containerization criterion. This supports the position taken by Senator Gorton in his reply to the Petition.

It is consideration of the general concerns of Congress rather than the torturous history of the actual word-crafting, which may shed more light on the definition's intended meaning. Congress was concerned with U.S. lumber exporters' ability to obtain low rates and maintain parity with foreign lumber suppliers. By exempting forest product commodities from tariff-filing requirements, shippers and carriers of forest products would benefit from greater flexibility in pricing, and thereby be able to compete more effectively with Canadian and other foreign lumber exporters who are not tied to tariffed rates on their products. A tariff-filing exemption for softwood lumber was in effect in the Shipping Act, 1916 ("1916 Act"), 46 U.S.C. § 817(b)(1) (1982), and it was not restricted to uncontainerized cargoes. There is no indication that Congress intended to restrict the softwood lumber exemption. The intention of Congress was to broaden the exemption and to do so on the basis of the commodity, not the packaging:

> "Forest products in an unfinished or semifinished state" expands the definition of "softwood lumber" contained in section 18(b)(1) of the 1916 Act. It is directed at exempting certain commodities from both the tariff filing and loyalty contract provisions of the bill.

S. Rep. No. 98-3, 98th Cong., 1st. Sess. 20 (1983).

Further militating against Petitioner's narrow interpretation of the exemption is the definition's enumeration of specific commodities, all of which appear

commonly to move via containers,[5] and the various anomalies, not intended by Congress, which would result from adoption of Petitioner's proposed ruling. These anomalies include the practical difficulties in applying all the criteria to forest products shipments on a shipment-by-shipment basis; the difficulties shippers and carriers would have in computing the applicability of service contracts covering forest products to particular shipments; the difficulty the Commission would have in monitoring such service contracts; the opportunities for price manipulation that would arise from carriers' or shippers' opting whether to containerize certain cargo; and the situation whereby identical commodities on the same vessel might be subjected to two different rates.[6]

The Commission cannot endorse a statutory interpretation which would yield absurd results or thwart the purpose of the statute. See U.S. v. Turkette, 452 U.S. 576, 580 (1981); Trans Alaska Pipeline Rate Cases, 436 U.S.

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[5] In citing the forest products definition, Petitioner conspicuously and entirely deletes the listing of the 17 commodities.

[6] The narrower "containerizable" position of NEC and the Atlantic/Gulf Conferences would eliminate certain of these anomalies, by avoiding the situations in which freight rates would depend on the choice of whether to containerize. Under their proposal, no containerizable cargo, whether put into containers or not, would qualify for the exemption. But this narrower interpretation would have the most drastic, pro-tariff-filing effect, which, as noted above, appears contrary to Congress' intent. Also, as a practical matter, there may be difficulties in determining whether a breakbulk shipment would have been "containerizable" for rating purposes.

631, 643 (1978). Rather, where there are arguably contradictory statutory passages, it is the Commission's responsibility to reconcile them in a manner consistent with Congress' intent. See Atwell v. Merit Systems Protection Bd., 670 F.2d 272, 286 (D.C. Cir. 1981).

Thus, the Commission is unable to concur in Petitioner's proposed view of the forest products definition. The internal inconsistencies in the definition are such that both Petitioner's and the opposing views of specific phrases in the definition would be reasonable interpretations when those phrases are read without regard to context or likely intent. However, this narrow focus seems to have caused Petitioner to miss the forest for the trees. A commodity-based exemption not conditioned on packaging is what Congress appears to have intended, and the reading of the definition which is consistent with this intent is, we believe, the correct interpretation of the exemption. The Commission therefore agrees with TWRA and Star Shipping that the definition's criteria are most appropriately read as general characteristics which serve to identify particular commodities. The references to special handling and to lot sizes help define commodities in terms of how they are usually or typically transported. They do not dictate an exemption qualification assessment on a

shipment-by-shipment basis.[7]

CONCLUSION

Upon consideration of the entire forest products definition, the relevant legislative history and the practical effects of the various interpretations advanced by the parties to this proceeding, the Commission concludes that it is unable to grant Petitioner's request for a Declaratory Order limiting the applicability of the forest products exemption to uncontainerized cargo.

THEREFORE, IT IS ORDERED, That the Petition for Declaratory Order of the U.S. Atlantic & Gulf/Australia-New Zealand Conference is denied.

By the Commission.

Joseph C. Polking
Secretary

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[7] The position of the other opponents of the Petition -- that there is a threshold lot size of more than one container before the shipment may qualify for the exemption -- would require a limited shipment-by-shipment assessment of lot size to determine exemption eligibility. This would not always be an easy determination to make. For example, containerized cargo approximating one containerload could be divided between two containers so that it would appear that the exemption applied. It could be difficult to establish that that cargo would have fit into one container. And uncontainerized cargo could be even more difficult to categorize as theoretically being of a lot size larger or smaller than a containerload. The Commission does not believe that Congress intended the forest products exemption to be subject to such possibilities of manipulation and uncertainty, but rather intended an exemption based purely on the commodities themselves, as identified in part by their general or usual packaging characteristics.